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Supreme Court of the United States

OCTOBER TERM, 1940

No. 441

H. E. BUTT GROCERY COMPANY ET AL,
Appellants

VS

GEORGE H. SHEPPARD ET AL,
Appellees

STATEMENT AS TO JURISDICTION ON APPEAL

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

Dan Moody

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STATEMENT AS TO JURISDICTION ON APPEAL

H. E. Butt Grocery Company and Southwest Texas Grocery Corporation, Appellants herein, submit this statement in accordance with Rule 12 of the rules of this Court, particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review this cause on appeal from the final judgment entered herein by the Court of Civil Appeals for the Third Supreme Judi-

cial District of Texas, sustaining a statute of the State of Texas challenged, as construed and applied by said Court of Civil Appeals in this case, as being repugnant to the Due Process Clause and the Equal Protection Clause of the Fourteenth Article of Amendment to the Constitution of the United States as hereinafter more fully pointed out.

I.
STATUTORY PROVISIONS SUSTAINING JURISDICTION

1. This Court has jurisdiction of this appeal under Section 237 of the Judicial Code as amended (U.S.C.A. Title 28, Section 344) which provides that:

> "(a) a final judgment or decree in any suit in the highest court of the State in which a decision in the suit could be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * * ."

2. Pursuant to the Act of January 31, 1928, (45 Stat. 54; U.S.C.A. Title 28, Section 861a) as amended by the Act of April 26, 1928, (45 Stat. 466; U.S.C.A. Title 28, Section 861b), the present appeal is brought in lieu of a writ of error.

II.
STATUTE OF THE STATE THE VALIDITY OF WHICH IS INVOLVED

The statute of Texas, the validity of which is here involved, is Chapter 400, Acts of the First Called Session of the 44th Legislature, which levies an occupa-

tion tax upon every person, agent, receiver, trustee, firm, corporation, association, or copartnership opening, establishing, operating, or maintaining one or more stores or mercantile establishments within the State of Texas which tax is graduated upward depending upon the number of stores operated under the same general management or ownership. The portions of the statute involved in this appeal read as follows:

> "Sec. 1. That from and after the passage of this Act it shall be unlawful for any person, agent, receiver, trustee, firm, corporation, association or copartnership, either foreign or domestic to operate, maintain, open or establish any store or mercantile establishment in this State without first having obtained a license so to do from the Comptroller of Public Accounts as hereinafter provided.
>
> "Sec. 2. Any person, agent, receiver, trustee, firm, corporation, association or copartnership desiring to operate, maintain, open or establish a store or mercantile establishment in this State shall apply to the Comptroller of Public Accounts for a license so to do. The application for a license shall be made on a form which shall be prescribed and furnished by the Comptroller of Public Accounts and shall set forth the name of the owner, manager, trustee, lessee, receiver, or other person desiring such license, the name of such store or mercantile establishment, the location, including the street number of such store, or mercantile establishment, and such other facts and information as the Comptroller of Public Accounts may require. If the applicant desires to operate, maintain, open or establish more than one such store or mercantile estab-

lishment, such applicant shall make application for a license to operate, maintain, open or establish each such store or mercantile establishment, but the respective stores or mercantile establishments for which the applicant desires to secure licenses may all be listed on one application blank.

"It is hereby made the further duty of the Comptroller to collect, supervise, and enforce the collection of all license and application fees that may be due under the provisions of this Act and to that end the said Comptroller is hereby vested with all of the power and authority conferred by this Act. The Comptroller is further authorized and empowered to promulgate rules and regulations to provide for the collection of the amount of license and application fees due under the provisions of this Act and on the effective date of this Act.

"Each application shall be accompanied by a filing fee of fifty (50) cents for each store or mercantile establishment operated or to be operated for the purpose of defraying the cost of administration of this Act.

"Each application shall be signed and sworn to by the applicant as being true and correct, before an officer authorized to administer oaths, and may contain such other information as the applicant may wish to include, or as the Comptroller may require.

"Sec. 3. As soon as practicable, after the receipt of any such application, the Comptroller of Public Accounts shall carefully examine such application to ascertain whether it is in proper form and contains the necessary and requisite information. If upon such examination, the Comptroller of Public Accounts shall

find that any such application is not in proper form and does not contain the necessary and requisite information, he shall return such application for correction. If an application is found to be satisfactory and if the filing and license fee as herein prescribed shall have been paid, the Comptroller of Public Accounts shall issue to the applicant a license for each store or mercantile establishment for which an application for a license shall have been made. Each licensee shall display the license so issued in a conspicuous place in the store or mercantile establishment for which such license is issued.

"4. All licenses shall be so issued as to expire on the thirty-first day of December of each year. On or before the thirty-first day of December of each year, every person, agent, receiver, trustee, firm, corporation, association or copartnership having a license shall apply to the Comptroller of Public Accounts for a renewal license for the calendar year next ensuing. All applications for renewal licenses shall be made on forms which shall be prescribed and furnished by the Comptroller of Public Accounts. Each such application for a renewal license shall be accompanied by a filing fee of fifty (50) cents for each store or mercantile establishment operated or to be operated and by the license fee as prescribed in Section 5 of this Act.

"Sec. 5. Every person, agent, receiver, trustee, firm, corporation, association or copartnership opening, establishing, operating or maintaining one or more stores or mercantile establishments within this State, under the same general management, or ownership,

shall pay the license fees hereinafter prescribed for the privilege of opening, establishing, operating or maintaining such stores or mercantile establishments. The license fee herein prescribed shall be paid annually and shall be in addition to the filing fee prescribed in Sections 2 and 4 of this Act. * * *

* * *

"The license fees herein prescribed shall be as follows:

"1. Upon one (1) store the license fee shall be One Dollar ($1);

2. Upon each additional store in excess of one (1) but not to exceed two (2), the license fee shall be Six Dollars ($6);

3. Upon each additional store in excess of two (2) but not to exceed five (5), the license fee shall be Twenty-five Dollars ($25);

4. Upon each additional store in excess of five (5) but not to exceed ten (10) the license fee shall be Fifty Dollars ($50);

5. Upon each additional store in excess of ten (10) but not to exceed twenty (20), the license fee shall be One Hundred Fifty Dollars ($150);

6. Upon each additional store in excess of twenty (20) but not to exceed thirty-five (35), the license fee shall be Two Hundred Fifty Dollars ($250);

7. Upon each additional store in excess of thirty-five (35) but not to exceed fifty (50), the license fee shall be Five Hundred Dollars ($500);

8. Upon each additional store in excess of fifty (50), the license fee shall be Seven Hundred Fifty Dollars ($750.00);

Such fees are for the period of twelve (12) months, and upon the issuance of any license after the first day of January of any one year, there shall be collected such fractional part of the license hereinabove fixed as the remaining months in the calendar year (including the month in which such license is issued) bears to the twelve-month period.

* * *

"Sec. 6. The provisions of this Act shall be construed to apply to every person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management.

"Sec. 7. The term 'store' as used in this Act shall be construed to mean and include any store or stores or any mercantile establishment or establishments not specifically exempted within this Act which are owned, operated, maintained, or controlled by the same person, agent, receiver, trustee, firm, corporation, copartnership or association, either domestic or foreign, in which goods, wares or merchandise of any kind are sold, at retail or wholesale.

"Sec. 8. Any person who, either for himself or as the agent of any person, receiver, trustee, firm, corporation, copartnership or association, shall operate or maintain any store or stores or mercantile establishment or mercan-

tile establishments as defined in this Act without having displayed in a conspicuous place in such store or mercantile establishment the license fee receipt for the current year as required in this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars ($25); nor more than One Hundred Dollars ($100), and each day of such violation shall constitute a separate and distinct offense.

"Sec. 9. The expenses incurred by the Comptroller of Public Accounts in the administration of this Act shall not exceed the amount received by him as application fees as herein provided. All monies collected by the Comptroller of Public Accounts under the provisions of this Act shall be paid by him into the State Treasury daily as received; one-fourth of same shall be credited to the account of the Available School Fund and the remainder shall be credited to the account of the General Fund.

* * *

"Sec. 11. If any section, provision, phrase or clause of this Act should be declared invalid, such invalidity shall not be construed to affect the portions of the Act not so held invalid."

III.

DATE OF JUDGMENT AND DATE OF PRESENTATION OF APPLICATION FOR APPEAL

1. The judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas sought to be reviewed herein was entered on February 7, 1940.

Appellants' motion for rehearing was filed within 15 days as authorized by Article 1877, Revised Civil Statutes of Texas, 1925. The motion was entertained and overruled on March 13, 1940. Thereupon within the time allowed by applicable statute (Article 1742, Revised Civil Statutes of Texas, 1925), Appellants petitioned the Supreme Court of Texas to grant a writ of error and review the case. The petition was refused by the Supreme Court on May 1, 1940. Appellants thereupon within 15 days as is authorized by Rule 4 of the rules of the Supreme Court of Texas filed their motion for rehearing of the application for writ of error. This motion for rehearing was entertained by the Supreme Court of Texas and was overruled on May 29, 1940. Whereupon the judgment of the Court of Civil Appeals, here sought to be reviewed, became final under the State law.

The Court of Civil Appeals has possession of the record in this cause and is the "highest court of the state in which a decision in the suit could be had." The following are examples of cases brought here from Courts of Civil Appeals in Texas (*Zucht vs King*, 260 U. S. 174; *Lone Star Gas Co. vs Texas*, 304 U. S. 224).

2. The date on which this application for appeal is presented is August /5, 1940.

IV.

THE NATURE OF THE CASE AND OF THE RULINGS OF THE STATE COURT BRINGING THIS CAUSE WITHIN THE JURISDICTION OF THIS COURT

Under this heading will also be shown when and how the Federal questions sought to be reviewed were raised; the method of raising them; and the way in

which they were passed upon by the State Court, as required by Rule 12.

NATURE OF THE CASE

In this suit Appellants challenge on grounds arising under the Federal Constitution, Chapter 400, Acts of the First Called Session of the 44th Legislature, the pertinent portions of which are copied under Heading II. The litigation originated by a suit filed by Appellants in the District Court of Travis County, Texas for the 98th Judicial District of Texas against Appellees, George H. Sheppard, in his capacity as Comptroller of Public Accounts of the State of Texas, Charley Lockhart, in his capacity as Treasurer of the State of Texas, and Gerald C. Mann, in his capacity as Attorney General of the State of Texas, for the recovery of $1,972.00 which Appellee George H. Sheppard has demanded and collected from Appellants asserted to be due under the provisions of Chapter 400, Acts of the First Called Session of the 44th Legislature, commonly referred to as the "Texas Chain Store Tax Statute." The amount sued for in this case was paid jointly by Appellants to the Appellee, George H. Sheppard, under protest and this suit was brought to recover this amount as authorized by Chapter 214, Acts of the Regular Session, 43rd Legislature, 1933, the relevant portions of which statute are hereto appended as Appendix "B."

In Appellants' First Amended Original Petition, upon which the cause was tried, it is alleged that Appellants, H. E. Butt Grocery Company and Southwest Texas Grocery Corporation, are private corporations duly and legally incorporated under and by virtue of the laws of the State of Texas; that each of Appellants

is a separate and distinct corporate entity; that they are operated entirely independently one of the other; that the management of each of said corporations is entirely separate from and independent of the other; that the said corporations have existed since long prior to the passage of the chain store tax law and that throughout their existence each has been operated separately from and independently of the other; that the said corporations are not now and have never been under the same general management and are not now and have never been owned or controlled by one management or association of ultimate management; that neither of Appellant corporations has ever owned any interest of any kind or character in the other; that neither of said corporations exercises or attempts to exercise any nature of control or management over the affairs of the other and that in every way the two corporations are in fact and in law separate and distinct organizations enjoying a separate and distinct legal existence as corporate entities; that there is not now and has never been any sort of joint action between the two corporations and that there is not now and has never been a community of interest of any kind or character existing between the two corporations save and except that H. E. Butt, a resident citizen of the State of Texas, is the owner of 83% of all the stock in H. E. Butt Grocery Company and is the owner of 75% of all the stock in Southwest Texas Grocery Corporation and that the said H. E. Butt has owned such stock in the two corporations since long prior to the passage of the Chain Store Tax Statute.

It was further alleged that throughout the years 1936, 1937, 1938, and 1939, which are involved in this

case, Appellant, Southwest Texas Grocery Corporation owned, operated, and maintained two retail grocery stores; that for each of such years the said Southwest Texas Grocery Corporation voluntarily paid the license and filing fees due under the provisions of the Chain Store Tax Statute upon a two-store chain; that Appellant H. E. Butt Grocery Company, during the year 1936 owned, operated, and maintained 25 stores; that during the years 1937 and 1938 the said H. E. Butt Grocery Company owned, operated, and maintained 27 stores; that during the year 1939 the said company owned, operated, and maintained 32 stores; that for each of the 4 years here involved Appellant, H. E. Butt Grocery Company, voluntarily paid the license and filing fees due under the Chain Store Tax Statute upon the stores owned, operated, and maintained by it as above set out; that the above mentioned voluntary payments were made by Appellants as separate and independent corporate entities.

Appellants alleged that after such voluntary payments had been made as above outlined, the Appellee, George H. Sheppard, purporting to act under the authority of the Chain Store Tax Statute, demanded an additional payment from Appellant corporations in the amount of $1,972.00; that in making demand for such additional payment the State Comptroller recognized that Appellants had paid in full all license and filing fees due under the Chain Store Tax Statute if, under such Statute, Appellants were to be taxed as separate and distinct corporations, but the additional assessment was demanded from Appellants solely upon the grounds that under the Statute, Appellants were required to pay the license and filing fees upon all

stores operated by the two corporations as if only a single chain were involved; that Appellants jointly paid the $1,972.00 additional assessment under protest as above set out and, in the time and manner prescribed by state statute, filed this suit for the recovery thereof.

In support of their cause of action Appellants alleged that the action of the State Comptroller in demanding and collecting the additional assessment above set out was arbitrary and without support in law and that Appellants had paid voluntarily all taxes due under the Chain Store Tax Statute and that the monies exacted from Appellants and which were paid under protest were illegally collected.

To the above allegations Appellees addressed a general demurrer and special exception in the nature of a general demurrer asserting that Appellants' petition failed to state a cause of action because H. E. Butt owned a majority of the stock in each of Appellant corporations and, therefore, under Section 6 of the Statute, all of the stores operated and maintained by Appellant corporations constituted a single chain and Appellants were required under the Chain Store Tax Statute to pay the license and filing fees measured by the total number of stores upon the basis of a single chain. Appellees' demurrer and exception were sustained by the trial Court, and, Appellants having declined to amend, the suit was dismissed.

On appeal the Court of Civil Appeals affirmed the action of the trial Court and sustained the validity of the statute notwithstanding the attacks hereinafter shown to have been made by Appellants thereon. Cer-

tain questions arose initially in the Court of Civil Appeals in connection with that Court's construction of the questioned statute, and its rulings were duly challenged by Appellants under the Federal Constitution, as will hereinafter more fully appear.

NATURE OF THE RULINGS OF THE STATE COURT BRINGING THIS CASE WITHIN THE JURISDICTION OF THIS COURT

1. Questions arising and rulings made in connection with Appellants' contention that the penal tax statute is invalid, as construed and applied in this case, because of its uncertainty and ambiguity.

On appeal to the Court of Civil Appeals, Appellants assigned as error the action of the trial Court in dismissing the suit, and in support of the assignment Appellants urged that the Act as construed by the trial Court was invalid because of its ambiguity and uncertainty, for the reason that, if the stores operated by the two independent corporations be treated as a single chain under the Chain Store Tax Statute, the Act fails to designate by whom the tax should be paid, whether by the majority stockholder or by the two corporations, and, if by the latter, the Act fails to specify what amount of tax should be paid by each of Appellant corporations; and, since the Act is a tax statute, penal in its nature, such uncertainties and ambiguities rendered the Act invalid. As appears from the opinion appended hereto the Court of Civil Appeals expressly sustained the statute against this attack. In sustaining the Act the Court of Civil Appeals stated:

> "It is true that the Texas Act does not undertake, in instances of common ownership,

> or control through majority stock ownership in two or more corporations, to specifically designate who must pay such tax, whether the owner of the majority of such stock, or the corporations themselves, nor if to be paid by the latter, in what proportion it shall be allocated to such respective corporations."

The Court of Civil Appeals further stated that "The failure of the statute to specifically provide how and by whom the tax so imposed should be paid" does not defeat its provisions.

In this connection the Court concluded:

> "If, as we conclude, these corporations, regardless of number, are due the tax prescribed by the Act, because of unified control through majority stock ownership, the State is not seriously concerned with how, as between themselves, they distribute that tax burden. That is a matter that they can adjust between themselves perforce the same unified majority stock ownership, which brings them within the terms of the Act itself."

Error was duly assigned as to this ruling of the Court in Appellants' motion for rehearing (Assignments 1, 2, 3, 4, 5 and 7). The motion being overruled the ruling was then complained of in the petition for writ of error filed in the Supreme Court of Texas (Petion, Assignments 1, 2, 3, 4, 5, and 6). The petition being refused, the same ruling was complained of in the motion for rehearing filed in the Supreme Court of Texas (Motion, Assignments 1, 2, 3, 4, 5 and 6, also First Proposition, Motion, page 2).

2. Questions arising and rulings made in connection with Appellants' contention that the statute as construed and applied by the Court of Civil Appeals in this case illegally delegates legislative power to a private individual.

In overruling Appellants' attack on the Chain Store Tax Statute as above set out, the Court of Civil Appeals held that because H. E. Butt owned a majority of the stock in each of Appellant corporations, all of the stores operated by the two separate corporations constituted a single chain under the statute and the Chain Store Tax thereon was due from the two corporations. The Court stated, however, that the statute did not provide who should pay the tax, and, if due from the corporations, the Act did not determine the amount of tax due from each of Appellant corporations. The Court held that the distribution of the tax due "is a matter that they (Appellant corporations) can adjust between themselves perforce the same unified majority stock ownership, which brings them within the terms of the Act itself." In their motion for rehearing, filed with the Court of Civil Appeals, Appellants assigned as error this ruling of the Court upon the ground that the statute so construed and applied resulted in an illegal delegation of legislative power to the majority stockholder of Appellant corporations (Assignments, 11 and 7). This motion being overruled, the ruling of the Court of Civil Appeals was then complained of in the petition for writ of error filed in the Supreme Court of Texas (Petition, Assignments, 10 and 6). The petition being refused, the same ruling was complained of in the motion for rehearing filed in the Supreme Court of Texas (Motion, Assignments 10 and 6, also, Second Proposition, Motion, page 8).

3. Questions arising and rulings made in connection with Appellants' contention that the Court's construction of the statute resulted in a classification of corporations for tax purposes based solely upon stock ownership in the corporations, denying to Appellants equal protection of the laws and due process of law.

In support of their assignment of errors in the Court of Civil Appeals, Appellants urged that the construction of the Statute adopted by the trial Court rendered the Act invalid under the Fourteenth Amendment to the Federal Constitution for the reason that, so construed, the Statute subjected Appellant corporations to different and far more burdensome occupation tax levies than that exacted from other corporations, operating the same number of stores and selling the same kinds of merchandise and in every way enjoying the same benefits and advantages as Appellants. Appellants urged that the classification under such construction had no relationship to the privileges enjoyed, but was made arbitrarily to depend solely upon the ownership of stock in the taxed corporations and, therefore, denied to Appellants the equal protection of the laws and due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

Although the above question was duly urged before the Court of Civil Appeals by Appellants, that Court in affirming the judgment of the trial Court failed to rule upon such contention, and in their motion for rehearing, filed with the Court of Civil Appeals, Appellants assigned as error the construction of the Statute by the Court, asserting that such construction rendered the Act invalid under the Fourteenth Amendment of the Federal Constitution for the reasons above

set out (Assignments, 8 and 9). This motion being overruled, the action of the Court of Civil Appeals in this connection was then complained of in the petition for writ of error filed in the Supreme Court of Texas (Petition, Assignments, 7 and 8) The petition being refused, the same contentions were presented in the motion for rehearing filed in the Supreme Court of Texas (Motion, Assignments 7 and 8, also, Third Proposition, Motion, page 13).

V.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THAT THE QUESTIONS INVOLVED ARE SUBSTANTIAL AND CASES BELIEVED TO SUSTAIN JURISDICTION

1. The Texas Chain Store Tax Statute is a penal tax statute and, as construed and applied by the State Court, denies to Appellants due process of law in violation of the Fourteenth Amendment to the Federal Constitution because of its uncertainty and ambiguity.

The license fees levied under the Texas Chain Store Tax Statute are occupation taxes. (*Hurt vs Cooper*, 130 Texas 433, 438) The Act provides that the tax must be paid each year before the State Comptroller, who administers the Act, shall issue store licenses authorizing the operation of stores covered by the Statute. Section 8 of the Act provides that "any person who, * * * *, shall operate or maintain any store or stores or mercantile establishment or mercantile establishments as defined in this Act without having displayed in a conspicuous place in such store * * * the license fee receipt for the current year as required in this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not less than Twenty-five Dollars ($25); nor more than One

Hundred Dollars ($100), and each day of such violation shall constitute a separate and distinct offense."

Appellants, operating a total of 34 stores in the year 1939, could be subjected to fines amounting to $1,241,000.00 per year for failure to comply with the Act. This Statute, which creates the offense, requires the payment of an occupation tax to avoid the penalties fixed by the Statute. The Court of Civil Appeals has held that the Act fails to provide who shall pay the tax. The Court further states that if the tax is collectible from Appellant corporations, the Act fails to specify what amount of tax is required from each of the corporations for it to comply with the provisions of the Statute. The Act, as construed by the State Court, fails to fix the standard of conduct required of each of Appellants in order for it to receive license fee receipts authorizing the operation of its stores without penalty. The Court of Civil Appeals has held that this is a matter in which the State is not seriously concerned but that it can be adjusted between Appellants "perforce the same unified majority stock ownership, which brings them within the terms of the Act itself."

The Chain Store Tax Statute, as construed by the State Court, denies to Appellants due process of law, as guaranteed by the Fourteenth Amendment to the Federal Constitution, in that it creates an offense and fixes a penalty for its commission but under its provisions it is impossible for Appellants to determine in advance what is required of them to comply with the Statute and thereby avoid the penalty. (*Connally vs General Construction Co.*, 269 U. S. 385, 391; *International Harvester Co. vs Kentucky*, 234 U. S. 216, 223; *Collins vs Kentucky*, 234 U. S. 634, 638; *Smith vs*

Cahoon, 283 U. S. 553, 564; *Cline vs Frink Dairy Co.*, 274 U. S. 445, 458; *Champlin Refining Co. vs Corporation Commission*, 286 U. S. 210, 242; *Lanzetta vs New Jersey*, 306 U. S. 451, 453.)

In *Connally vs General Construction Co.*, 269 U. S. 385, 391, it is stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The same rule is applied under the Fifth Amendment to the Federal Constitution. (*United States vs Cohen Grocery Co.*, 255 U. S. 81, 89; *Weeds vs United States*, 255 U. S. 109, 110; *Yu Cong Eng vs Trinidad*, 271 U. S. 500, 518) The principle has been applied to civil proceedings the same as in criminal prosecutions. (*Small Co. vs American Sugar Refining Co.*, 267 U. S. 233, 239).

2. The Texas Chain Store Tax as construed and applied by the Court of Civil Appeals denies to Appellants due process of law in violation of the Fourteenth Amendment of the Federal Constitution in that it delegates legislative power to a private individual.

The Court of Civil Appeals has held that for the year 1939, in which H. E. Butt Grocery Company operated 32 stores and Southwest Texas Grocery Cor-

poration operated 2 stores, Appellants were required to pay the Chain Store Tax on the basis of a single chain of 34 stores. In this connection the Court held:

> "If, as we conclude, these corporations, regardless of number, are due the tax prescribed by the Act, because of unified control through majority stock ownership, the State is not seriously concerned with how, as between themselves, they distribute that tax burden. That is a matter that they can adjust between themselves perforce the same unified majority stock ownership, which brings them within the terms of the Act itself."

The Chain Store Tax Statute, thus construed, delegates to the majority stockholder of Appellant corporations the power to determine the amount of the total tax which each of the corporations shall contribute. The private individual to which this power is delegated has a marked personal interest in the matter involved and the interest may be adverse to other stockholders in Appellant corporations. The occupation tax which each of Appellants may be called upon to pay can vary from year to year depending upon the will of the majority stockholder, although the privileges accruing to Appellants from the businesses operated remain entirely unchanged. The Court of Civil Appeals suggests no limitation upon the power delegated to the majority stockholder to allocate the tax between the corporations. The function of determining who shall pay a tax and what amount shall be paid is no less legislative in its character than the function of determining that the tax shall be imposed.

A legislative enactment which delegates legislative power to a private individual or individuals denies due process of law in violation of the Fourteenth Amendment of the Federal Constitution. (*Eubank vs City of Richmond*, 226 U. S. 137, 143; *Browning vs Hooper*, 269 U. S. 396, 405; *Seattle Trust Co. vs Roberge*, 278 U. S. 116, 121)

The same principle is applied under the Fifth Amendment to the Federal Constitution, (*Schechter Corporation vs United States*, 295 U. S. 495, 537; *Carter vs Carter Coal Company*, 298 U. S. 238, 311, 318).

In *Carter vs Carter Coal Company*, 298 U. S. 238, 311, in condemning the delegation of legislative power found in the Bituminous Coal Conservation Act of 1935, the Court stated:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interest of others in the same business."

In *Seattle Trust Company vs Roberge*, 278 U. S. 116, 121, the Court held an ordinance of the City of Seattle, Washington, invalid because it undertook to delegate legislative power to private individuals in violation of the Fourteenth Amendment. In that case, page 121, the Court said:

> "The section purports to give the owners of less than one-half the land within 400 feet of

> the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. Yick Wo v. Hopkins, 118 U. S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. Eubank vs Richmond, 226 U. S. 137, 143. Browning v. Hooper, 269 U. S. 396."

The principle adopted by this Court in the above cited cases condemns the delegation of legislative power found in the Texas Chain Store Tax Statute as construed by the State Court.

3. The Texas Chain Store Tax Statute, as construed by the State Court, fixes a classification for occupation tax purposes based entirely upon stock ownership, so that the tax imposed has no relationship to the benefits enjoyed, and such classification is arbitrary and unreasonable and deprives appellants of property without due process of law and denies to Appellants the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

Under the Court of Civil Appeals' construction of the Texas Chain Store Tax Statute, two corporations, which enjoy the same benefits, operate the same number of stores and sell the same kinds of merchandise, are required to pay greatly different amounts of occupation tax solely because of the difference in the ownership of stock in the respective corporations. Under the

construction, the classification of corporations for occupation tax purposes can be entirely changed by a simple transfer of stock certificates.

Chain store taxation has been sustained upon the ground that the classification between a business operating a single store and a business operating a chain of stores has reasonable support in the fact that there are numerous advantages found in chain store methods of merchandising which are not present in merchandising through one store organizations. (*State Board of Tax Commissioners vs Jackson*, 283 U. S. 527; *Liggett Company vs Lee*, 288 U. S. 517; *Great Atlantic & Pacific Tea Co. vs Grosjean*, 301 U. S. 412.) It has also been held that the gradation of the chain store tax upward depending upon the number of retail outlets is not unreasonable because it is held that the advantages of chain store operations increase as the number of units in the chain increases. (*Fox vs Standard Oil Co.*, 294 U. S. 87)

In the decision of the Court of Civil Appeals, advantages, benefits, number of stores operated and the kinds of merchandise sold are completely disregarded in classifying corporations under the tax statute, and stock ownership is made the sole basis of classification. In *Liggett Company vs Lee*, 288 U. S. 517, the holding in *State Board vs Jackson*, 283 U. S. 527, was reaffirmed; however, the Court condemned the provision of the Florida chain store tax which fixed one rate upon the stores of the taxpayer if all were located within one county, and fixed another and higher rate if the stores were located in more than one county. The Court, pages 533-534, stated:

"We are unable to discover any reasonable basis for the classification. * * *

"The appellees suggest that an owner reaps greater advantages by the establishment of a new store in a county not previously occupied. This may be conceded. It is evident, however, that the mere spatial relation between the store and a county line, cannot, in and of itself, affect the value of the privilege enjoyed. The appellees fail to show how the fact that the new place of business lies in another county increases the advantage over that to accrue from a location within the same county. The classification is solely of different chains, and the difference between them consists neither in number, size, surrounding population, nor in any factor having a conceivable relation to the privilege."

VI.

OPINION APPENDED

Copy of opinion of the Court of Civil Appeals (Unofficially reported 137 S. W. (2d) 823) is attached as Appendix "A."

Attorney for Appellants.

APPENDIX "A"

OPINION OF COURT OF CIVIL APPEALS

(Reported 137 S. W. (2d) 823)

No. 8983

H. E. BUTT GROCERY COMPANY ET AL,
Appellants

VS

GEORGE H. SHEPPARD ET AL,
Appellees

APPEAL FROM DISTRICT COURT OF TRAVIS COUNTY

Suit was filed by H. E. Butt Grocery Company and the Southwest Texas Grocery Corporation, separate and distinct private corporations, against the State Comptroller, the State Treasurer, and the Attorney General to recover $1972.00 occupation taxes, paid under protest, and exacted by the Comptroller under the provisions of the "Chain Store Tax Statute" (Chap. 400, Acts 1st Called Session, 44th Legislature). The sum involved was an additional tax demanded for the four years prior to and including 1939. In the latter year it was alleged that the Plaintiff, H. E. Butt Grocery Company, owned and operated 32 grocery stores with headquarters at Harlingen, Texas; that Southwest Texas Grocery Corporation owned and operated two grocery stores with headquarters at Del Rio, Texas; and that H. E. Butt owned 83% of the stock of the former and 75% of the stock of the latter corporation. The trial court sustained a general demurrer to their petition, the plaintiffs declined to amend and their suit was dismissed; hence this appeal.

Appellants' contention here, and alleged in their petition, is that they are separate and distinct corporations, neither owning any stock in, nor exercising any control over, the other; that they constitute separate entities; and that each owned, under said law, only a tax on the number of stores owned and operated by it. That is, that under the "Chain Store Tax Statute," the H. E. Butt Grocery Company owed a tax on a chain of 32 stores; the Southwest Texas Grocery Corporation owed a tax on a chain of two stores; and that the Comptroller could not disregard the separate legal entities of the two corporations, and exact a tax of the two corporations, treating them as a single unit of 34 stores and computing the tax accordingly, notwithstanding the ownership of the majority of the stock in each by H. E. Butt.

Appellants cite numerous authorities and discuss at length the nature, character, powers and liabilities of a corporation as a legal entity, separate and distinct from its individual stockholders, and insist that in assessing and collecting the tax in question, the Comptroller ignored these distinct legal entities.

The general characteristics of a corporation as a distinct entity separate and apart from its stockholders, regardless of how and by whom its stock is held, are well settled and uniformly recognized. We refer, without discussing these distinctions here, to 10 Tex. Jur., Sec. 45, p. 639; 13 Am. Jur., Sec. 6, p. 157; and 18 C. J. S., Sec. 4, p. 368, for a full treatment of this subject.

Appellants also contend that, as applied to the fact situation here presented, the legislative intent, under the provisions of the law in question, is so ambiguous,

obscure and uncertain, as to make applicable to them, the rule of strict construction thereof against the State and of liberal construction in favor of the taxpayer. And that when so construed the additional tax here involved was and is not due the State. The rule asserted is well recognized. See 40 Tex. Jur., Sec. 45, p. 68 and cases cited. It is also to be noted that said Act is a penal statute (See Vernon's Texas Statutes, 1936, Art. 1111d, Penal Code), which generally must likewise be strictly construed. 39 Tex. Jur., Sec. 146, p. 276. But if the true intent of the Legislature is clearly reflected by the provisions of the Statute, it should be so construed as to carry that intent into effect. *Thompson v. M. K. & T. Ry. Co.*, 103 Tex. 372; 126 S. W. 257; 128 S. W. 109.

Sec. 5 of said Act requires the license fees therein prescribed to be paid by *every* person or "corporation * * * operating * * * one or more stores, * * * within this State, under the same general management or ownership * * * ."

Sec. 6 provides that the "Act shall be construed to apply to *every* person (or) * * * corporation * * * which is controlled or held with others by majority stock ownership or ultimately controlled or directed by one management or association of ultimate management * * *."

Sec. 6 was manifestly intended to prevent large chains of stores, which receive the benefits flowing from such system, (considered and enumerated in part by the U. S. Supreme Court in *State Board of Tax Comrs. v. Jackson*, 283 U. S. 527; 75 L. Ed. 1248, and in *Hurt v. Cooper*, 130 Tex. 433; 110 S. W. (2d)

896, sustaining the validity of the Act as constituting a reasonable classification), from circumventing the tax burdens imposed under the Act, by organizing separate corporations to operate them, the capital stock of which, or a majority of it, being owned by a parent corporation or holding company, or by an individual or association of individuals. Thus through a common management or control over a number of individual units or corporations the clear purpose of the law would be defeated. While in the instant case no such condition prevailed, in that appellant corporations were organized and were operating stores separately before the Act was passed, the principle is the same, the benefits the same, and the result would be the same. This exact provision of the chain store tax law of Michigan was held valid in *Smith v. Fitzgerald*, 270 Mich. 659; 259 N. W. 352. A similar provision of the West Virginia Statute was upheld in *Gulf Ref. Co. v. Fox*, 11 Fed. Supp. 425, wherein the Court in effect held that majority stock ownership of such corporations was tantamount to a "control" thereof within the meaning of such law. This holding would apply with equal force whether such majority stock ownership be lodged in an individual or in another corporation.

It is true that the Texas Act does not undertake, in instances of common ownership, or control through majority stock ownership in two or more corporations, to specifically designate who must pay such tax, whether the owner of the majority of such stock, or the corporations themselves, nor if to be paid by the latter, in what proportion it shall be allocated to such respective corporations. It merely makes "The provisions of

this Act * * * apply to every "such person, firm, corporation, etc."

Manifestly the statute could have easily been made more specific in this regard. We conceive, however, that all of the contentions here made by appellants, whether actually raised in the attack upon the validity of the Act or not, were necessarily involved in the attacks made upon its constitutionality in Hurt v. Cooper, which followed the decisions in the Jackson and Fitzgerald cases, and Liggett v. Lee, 288 U. S. 517; 77 L. Ed. 929; 85 A.L.R. 699; in all of which cases the validity thereof, notwithstanding such indefiniteness in the respects stated, was sustained. The ownership by Butt of 83% of the stock in one corporation, and of 75% of the stock in the other, gave him such unified control of both corporations, through such stock ownership, as to bring the stores owned and controlled by such separate corporations under the provisions of the Act; and required that they be treated as one chain for tax purposes. The failure of the Legislature to specifically provide how and by whom the tax so imposed should be paid, should not, in view of the decisions upholding the Act as valid, be permitted to defeat its provisions. To sustain appellants contentions, and tax the two corporations involved only on the basis of the stores owned and operated by each, thus ignoring the majority stock ownership provision of Sec. 6, would in effect nullify Sec. 6, and so defeat the very purposes it was enacted to accomplish; and would, in effect, be in conflict with the decision in Hurt v. Cooper holding such provision valid. While we are here confronted with the application of the act to a factual situation presented, rendered difficult because of its indefiniteness,

we are not at liberty to so apply it as to render it nugatory in practice.

The Act in question clearly encompassed within its terms the fact situation here presented. The additional tax was demanded by the Comptroller on the finding by him that the 34 stores constituted under said Act but a single chain under the control of H. E. Butt through his majority stock ownership of the two corporations operating them. It was paid under protest. Only the two corporations have sued. It was not alleged by whom nor in what proportion the additional tax was paid. If, as we conclude, these corporations, regardless of number, are due the tax prescribed by the Act, because of unified control through majority stock ownership, the State is not seriously concerned with how, as between themselves, they distribute that tax burden. That is a matter that they can adjust between themselves perforce the same unified majority stock ownership, which brings them within the terms of the Act itself.

The trial Court did not err, therefore, in sustaining the demurrer to the appellants petition, and its judgment will be affirmed.

(Signed) J. H. Baugh,
Associate Justice.

Affirmed:
Filed February 7, 1940.

APPENDIX "B"

PROTEST STATUTE

"Section 1. Any person, firm or corporation who may be required to pay to the head of any department of the State Government any occupation, gross receipt, franchise, license of other privilege tax or fee, and who believes or contends that the same is unlawful and that such public official is not lawfully entitled to demand or collect the same shall, nevertheless, be required to pay such amount as such public official charged with the collection thereof may deem to be due the State, and shall be entitled to accompany such payment with a written protest, setting out fully and in detail each and every ground or reason why it is contended that such demand is unlawful or unauthorized.

"Section 2. Upon the payment of such taxes or fees, accompanied by such written protest, the taxpayer shall have ninety (90) days from said date within which to file suit for the recovery thereof in any court of competent jurisdiction in Travis County, Texas, and none other. Such suit shall be brought against the public official charged with the duty of collecting such tax or fees, the State Treasurer and the Attorney General. The issues to be determined in such suit shall be only those arising out of the grounds or reasons set forth in such written protest as originally filed. The right of appeal shall exist as in other cases provided by law. Provided, however, where a class action is brought by any taxpayer all other taxpayers belonging to the class and represented in such class action who have properly protested as herein provided shall not be required to file separate suits but shall be entitled to and governed by the decision rendered in such class action."

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 441

H. E. BUTT GROCERY COMPANY ET AL,
Appellants,

VS

GEORGE H. SHEPPARD ET AL,
Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR REHEARING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 441

H. E. BUTT GROCERY COMPANY ET AL,
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VS

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Appellees.

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

H. E. Butt Grocery Company and Southwest Texas Grocery Corporation, Appellants in the above entitled and numbered cause, petition the Court to grant a rehearing on its order entered on October 14, 1940, dismissing the appeal herein, and in support thereof, respectfully show:

The chain store tax questions involved in this appeal, we think, have not heretofore been presented to this Court. The Court has dismissed the appeal for want of a substantial federal question and, in support of this order, has cited *Board of Tax Commissioners vs Jackson*, 283 U. S. 527; *Liggett Co. vs Lee*, 288 U. S. 517; *Fox vs Standard Oil Co.*, 294 U. S. 87; *Great A. & P. Tea Co. vs Grosjean*, 301 U. S. 412.

From the above order we assume that the Court has concluded that the federal questions presented herein have been decided in the cited cases contrary to the contentions of Appellants. Of this conclusion we respectfully ask a re-examination by the Court in the light of the record and the legal principles applicable thereto.

First, Appellants herein do not attack the Texas Chain Store Tax Statute because of any discrimination contained therein between chains and a separately owned and operated store. On the contrary, we recognize that such classification is reasonable and has been sustained by this Court. Appellants herein assert that the Texas Act, as construed by the State Court in this cause and as applied to the particular situation of these two Appellants, results in an arbitrary discrimination between corporate chains. The question here presented was not involved in either of the cases cited in the per curiam opinion dismissing the appeal; and Appellants' position is not, we believe, overruled, but supported by the cases so cited.

Appellants are two independent corporations each operating more than one retail store. The State Court has held that the two chains are made one by the single

fact that the same individual owns a majority of the stock in Appellant corporations. Under this construction of the Act, each of Appellant corporations, solely because of the ownership of its corporate stock, is required to pay a far more burdensome occupation tax than other corporations which enjoy the same advantages, operate the same number of stores and sell the same kinds of merchandise. Under the construction, the classification of Appellant corporations for occupation tax purposes is based on corporate stock ownership and can be entirely changed by a simple transfer of stock certificates.

We call the Court's attention to the fact that, in each of the four above cited cases, chain store tax statutes were sustained because the classifications therein contained had a reasonable relationship to advantages enjoyed; and, in *Liggett Co. vs Lee*, 288 U. S. 517, that portion of the Florida Act was stricken which carried a classification unrelated to advantages or privileges. Further, in *Board of Tax Commissioners vs Jackson*, 283 U. S. 527, 542, the Court specifically emphasized that the difference supporting the classifications contained in the Act was not "solely one of ownership." It was there stated that the differences "consist not merely in ownership, but in organization, management, and type of business transacted." In the instant case, the classification of Appellant corporations is determined by the stock ownership in such corporations, which classification, we respectfully urge, is not supported by the above cited decisions of this Court or by any differences reasonably related to advantages and privileges enjoyed or to the differences upon which chain store tax statutes have been upheld.

In addition to the above, we direct the Court's attention to the first two propositions presented in Appellants' Statement as to Jurisdiction of the Court under which the Texas Act, as construed and applied, is attacked under the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. These propositions, we believe, cannot be governed by the cases cited in the Court's order dismissing this appeal. Those cases were decided primarily, if not entirely, under the equality clause of the Fourteenth Amendment; while Appellants, in their first two propositions, assert the denial of due process without mention of the equal protection clause. Concerning these clauses of the Federal Constitution, this Court has long held that "the spheres of the protection they offer are not coterminous." (*Truax vs Corrigan*, 257 U. S. 312, 332.)

Appellants have attacked the statute as construed by the State Court in this case as denying due process because (1) the penal tax statute, as construed in this cause, creates a new offense but is so vague and indefinite that it fails to inform Appellants what conduct is either required or forbidden; (2) the Act, as construed, subjects Appellants to an occupation tax but delegates to the majority stockholder in Appellant corporations the legislative power to determine the amount of the total tax which shall be contributed by each of the taxpayers.

In Appellants' Statement, these propositions, with supporting authority, are set out in greater detail. They will not be re-argued here; but Appellants again emphasize that the attacks made thereunder do not involve equal protection of the laws. Irrespective of whether the classification is consonant with the

equality clause, we urge that the legislation falls short of due process even if every taxpayer within the State were affected by the Act in the same way as Appellants. We respectfully submit that such federal questions are substantial and that they cannot be foreclosed by the cited cases which arose and were decided under the equality clause.

WHEREFORE, Appellants pray that this Petition for Rehearing be granted and that the order entered on October fourteenth dismissing the appeal herein be set aside and upon final hearing that the judgment entered on February 7, 1940, by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, be reversed.

Respectfully submitted,

DAN MOODY,
Attorney for Appellants.

I, Dan Moody, an attorney of record in the above case, do hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

To certify which, witness my hand this the 25th day of October, 1940.

Attorney for Appellants.

ACKNOWLEDGMENT OF SERVICE

Service of the foregoing Petition for Rehearing is acknowledged, this the.....day of October, 1940.

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Attorneys for Appellees.

No. 441. H. E. Butt Grocery Co. et al. *v.* Sheppard, Comptroller of Public Accounts of Texas, et al. Appeal from the Court of Civil Appeals, 3d Supreme Judicial District, of Texas. October 14, 1940. *Per Curiam:* The appeal is dismissed for want of a substantial federal question. *Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Liggett Co.* v. *Lee*, 288 U. S. 517; *Fox* v. *Standard Oil Co.*, 294 U. S. 87; *Great A. & P. Tea Co.* v. *Grosjean*, 301 U. S. 412. *Mr. Dan Moody* for appellants. *Mr. Cecil C. Rotsch* for appellees. Reported below: 137 S. W. 2d 823.